

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1077

To be argued by
BARRY A. BOHRER

B
PKS

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET No. 77-1077

UNITED STATES OF AMERICA,

Appellee,

against

LEANDRO KATZ,

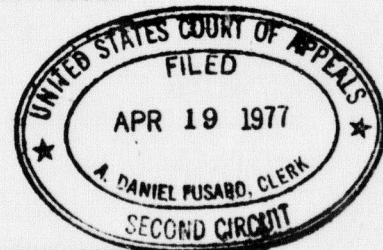
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT LEANDRO KATZ

IVAN S. FISHER
Attorney for Appellant,
Leandro Katz
410 Park Avenue
New York, New York 10022
(212) 355-2380

BARRY A. BOHRER,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

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RLG:jm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x

UNITED STATES OF AMERICA, :

-v- :

STEPHEN WILKINSON, and :
JOHN DOE "Leo". :

INDICTMENT

75 Cr. 457

Defendants. :
----- -x

COUNT ONE

The Grand Jury charges:

On or about the 7th day of August, 1974 in
the Southern District of New York, STEPHEN WILKSON and
JOHN DOE "Leo" the defendants, unlawfully, wilfully and
knowingly did distribute and possess with intent to dis-
tribute a Schedule II narcotic drug controlled substance,
to wit, approximately 27.94 grams of cocaine hydrochloride.

(Title 21, United States Code, Section 812,
841(a)(1) and 841(b)(1)(A) Title 18, United
States Code, Section 2.)

[]

COUNT TWO

The Grand Jury further charges:

On or about the 7th day of August, 1974 in the Southern District of New York, STEPHEN WILKSON and JOHN DOE "Leo" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 27.45 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Title 18, United States Code, Section 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

BEST COPY AVAILABLE

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE STEWART

75 CRIM. 457

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D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.:
vs.		Harry C. Batchelder, Sp. At.
1. STEPHEN WILKINSON- all cts. 0		791-1940 206
2. JOSEPH ROLLO- 1 C 12/14/75 1221		
3. JOHN DOE, a/k/a Walter-1&2		
4. JOHN DOE, a/k/a Leo-1,3&4 --True Name is: LEANDRO KATZ C.C. 1-27-77		
Deft. Katz--Arthur Bailly 30E.42St, NYC 682-8313		For Defendant: Rollo Robert Mitchell 51 Chambers St, NYC 10007 WO-2-0675 WILKINSON--Legal Aid 13 Park Row, NYC 10th Floor NYC 10038 374-1737

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title 21					
Sec. 846, 812, 841(a)(1), (b).					
Consp. to viol. Fed. Narco. Laws. (Ct. 1)					
Distr. & possess. w/intent to distr.					
Cocaine, II. (Cts. 2-4)					
(Four Counts)					

DATE	PROCEEDINGS
5-9-75	Filed indictment and ordered sealed. Wyatt, J. B/W ordered. ISSUED
6-25-75	Indictment ordered unsealed. Knapp, J.
7-7-75	Hearing adj. to 7-21-75. CARTER, J.
7-21-75	Court directs entry pleas. Case assigned to Judge Stewart for all purposes. Conner, J.
09-03-75	J. ROLLO--Filed ORDER--ORDERED that the Federal Defender Services is relieved as xcounsel for deft. and Robert Mitchell is appointed to represent said deft. under the CJA Act. Stewart, J. m/n
09-12-75	Filed govts. notice of readiness for trial.
10-2-75	Filed govts. notice of readiness for trial.

DATE	PROCEEDINGS
9-11-75	JOSEPH ROLLO--Filed defts. financial affdt. (placed in this file. also see 75 CR 798 (LFM))
10-20-75	JOSEPH ROLLO--(atty. present) (Roland Thau)--Bail application made. Bail set at \$5,000 cash or surety. Owen, J.
10-27-75	ALL DEFTS.--Pre-trial conference held. Deft. ROLLO to appear on 10/8/75 at 10am. Defts. WILKINSON & KATZ--to appear on 10/22/75 at 4:30pm. Stewart, J.
10-28-75	JOSEPH ROLLO--(atty. Robert Mitchell, present)--deft. withdraws plea of not guilty and pleads GUILTY. PSI ordered. Sentence adj. sine die. STEPHEN WILKINSON--(atty. Gutman present)--application to withdraw as ex counsel. Application granted. Stewart, J.
10-28-75	JOSEPH ROLLO--Filed defts. acknowledgment of his constitutional rights.
10-30-75	STEPHEN WILKINSON--Filed the following papers from the Magistrate's office: warrant of arrest; disposition sheet; appearance bond in the amt. of \$5,000 PRB; appointing of counsel by the Legal Aid Society; and Magistrate's docket entries
12-24-75	JOSEPH ROLLO--Filed JUDGMENT--(atty. Robert Mitchell, present)--the deft. hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of THREE(3) YEARS, execution of sentence is suspended and the deft. is placed on probation for a period of THREE(3) YEARS. A Special condition of probation being that the deft. attend a drug treatment facility that will be recommended by the Probation Department of this Court. The sentence imposed this day is to run concurrently with the sentence imposed by Judge Lloyd F. MacMahon on Dec. 3, 1975. Stewart, J. (copies issued)
2-23-76	L. KATZ--Filed the following papers recd. from the office of Mag. Jacobs: docket sheet; warrant of arrest; disposition sheet; and appearance bond in the amt. of \$10,000 secured by \$500.00 and appearance sheet by Arthur Bailly of 30 E. 42 St, NYC
11-14-76	J. ROLLO--Filed CJA copy # 2 appointing Robert Mitchell of 51 Chambers St, NYC 10007 as defts. atty. Orig. mailed to AO, Wash., DC for payemtn.
11-14-76	J. ROLLO--Filed CJA copy # 5 appointing Robert Mitchell as defts. atty. Orig. to AO, Wash., DC for payment. Stewart, J.
2-3-76	Leandro Katz, - Filed defts. request to charge.
2-3-76	Leandro Katz, - Filed defts. voir dire questions.
2-06-76	Filed Govt's requested voir dire questions on prospective jurors.
2-6-76	Filed Govt's requests to charge.
3-30-76	STEPHEN WILKINSON - Attys John G. Koehl Esq & Terrence Jones Esq. represent the deft being present. The deft withdraws N/G plea as to count one (1) & pleads guilty to count one (1) PSI ordered. Sentence adj to 3-16-76 at 9:30 cont'd pending sentence...Stewart, J.

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DATE	PROCEEDINGS
12-7-76	John Doe "Leo" true name Leandro Katz, Atty. Irven S. Fisher, Esq., present. Jury empanelled Trial begun Ct. one on Govts motion servered. Objection by deft.....STEWART,J.
12-8-76	Trial Cont'd.
12-9-76	Trial Cont'd. Jury verdict. Guilty on each of Cts. 3 & 4 as charged P.S.I. Ordered. Sentence adj'd to Jan 17, 1977 at 9:30 A.M. Bail cont'd 10,000 PRB secured by \$500.00 cash cont'd to date of sentence. Ct. One to be disposed of at date of sentence. Deft. to surrender passport to A.U.S.A. 12-10-76.....STEWART,J.
12-10-76	Filed Govt's supplemental requests to charge.
12-10-76	Filed Govt's supplemental Requests No. 2.
12-10-76	LEANDRO KATZ, Filed Transcript of record of proceedings. 12-7,8,9-76.
1-17-77	LEANDRO KATZ- Fld deft's presentence memorandum
1-28-77	LEANDRO KATZ- Filed JUDGMENT & PROBATION (atty present) IMPOSITION OF SENTENCE IS SUSPENDED & the deft is placed on Probation for a period of ONE (1) YEAR, subject to the standing Probation Order of this Court. Sentence imposed on each of cts 3 & 4 & are to run concurrently with each other. DEFT's motion to dismiss count ONE (1) , no objection by Govt. Motion granted... Stewart,J. Issued copies .
2-4-77	Fld notice of appeal from the judgment of conviction entered on the 28th day of January 1977 . Mailed notice to deft & to U.S. Atty (Leandro Katz)
2-3-77	WILKINSON - B/W Issued
2-9-77	LEANDRO KATZ- Fld deft's affid & notice of motion for a recommendation against the deportation of deft. ret 2-15-77
2-18-77	LEANDRO KATZ- Filed certification of record on appeal
3-8-77	Leandro Katz- Fld govt's affid in oppositadon to deft's motion for a recommendation against deportation
3-8-77	Leandro Katz- Fld memorandum of law
4-11-77	LEANDRO KATZ - Filed Transcript of record of proceedings, Vol. 1-2,3-77

1-6005
 Burnett, Musa
 United States of America vs.

United States District Court for

DEFENDANT

Southern District of New York

LEANDRO KATZ; a/k/a "Leo"

DOCKET NO. 75 Cr. 457

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government
 the defendant appeared in person on this date

MONTH DAY YEAR
 January 28, 1977

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

IVAN FISHER, ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
 there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING &
 JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Cts. 3 & 4 :
 Defendant has been convicted as charged of the offense(s) of Distribution and possession with intent
 to distribute a Schedule II controlled substance.

(Title 21, USC, Sections 812, 841(a)(1) & 841(b)(1)(A))

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: ~~THE COURT ORDERED THAT THE DEFENDANT BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF~~

SENTENCE
OR
PROBATION
ORDER

IMPOSITION OF SENTENCE IS SUSPENDED and the Defendant is placed on Probation for a period of ONE (1) YEAR, subject to the standing Probation Order of this Court .

SPECIAL
CONDITIONS
OF
PROBATION

Sentence imposed on each of counts 3 and 4 and are to run concurrently with each other .

Defendant's motion to dismiss count One (1), no objection by Government . Motion Granted .

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

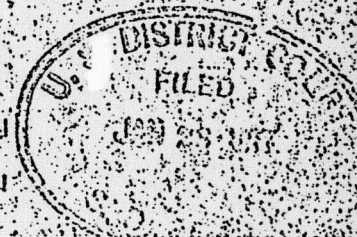
☒ U.S. District Judge

☐ U.S. Magistrate

JAN 31 1977

Charles E. Stewart

Date Jan. 28, 1977



UNITED STATES DISTRICT COURT

A-8

UNITED STATES OF AMERICA

Docket Number

75 Cr. 457

-against-

LEANDRO KATZ

Charles E. Stewart, Jr.

(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that

Leandro Katz

appeals to

the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other
(specify) _____ entered in this action on January 28, 1977
(Date)

Ivan S. Fisher

(Counsel for Appellant)

Date February 4, 1977
~~January 28, 1977~~Address 410 Park Avenue
New York, N. Y.

To: Robert B. Fiske, Jr.
U.S. Attorney
Southern District of N.Y.
1 St. Andrews Plaza
New York, N.Y. 10007

Phone Number 355-2380

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE

- ☒ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

- Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☒ Sentence
☐ Post-trial proceedings

▶ DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☒ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE February 4, 1977
~~January 28, 1977~~

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date _____

Signature _____

(Court Reporter)

ORIGINAL

DEFENDANT'S REQUEST TO CHARGE

ENTRAPMENT

Mr. Katz asserts that he was a victim of entrapment as to the crimes charged in the indictment.

I instruct you as a matter of law that where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law-enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

The fact that the government officials or their agents merely afford opportunities to one who is ready and willing to violate the law when the opportunity presents itself does not constitute entrapment. However, in their efforts to enforce the laws, Government officials and their agents may not entrap an innocent person who, except for the inducement, would not have engaged in the criminal conduct charged.

Entrapment occurs when the criminal conduct was the product of the creative activity of the law enforcement officials or their agents, that is, if they initiate, incite, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct. And if that occurs, the Government may not avail itself of the fruits of this instigation.

In this regard, Mr. Katz asserts that he was induced to violate the law by the activities of agents of the Government.

I instruct you that, as a matter of law, the Government is responsible for the acts of its agents even though these people may be unaware that the person at whose behest they are acting was, in fact, a law enforcement officer.

If you find that the defendant has offered some evidence to show that he was induced or persuaded to engage in the narcotics transaction charged in the indictment by a law-enforcement officer or an agent of a law-enforcement officer, then the Government has the burden of proving to you beyond a reasonable doubt that the defendant was not entrapped -- that he did not need any persuasion. In short, in these circumstances, the government must prove to you beyond a reasonable doubt that Mr. Katz was ready and willing, without persuasion, to commit the offense whenever the opportunity arose.

In a nutshell, to overcome the defense of entrapment, the government must satisfy you beyond a reasonable doubt that its agents did not seduce an innocent man, but that the transaction in which the defendant engaged was another instance of the kind of conduct that the defendant was prepared to engage in if given the opportunity.

If you have a reasonable doubt that Mr. Katz would have committed the offenses charged without the inducement of agents of the Government, then it is your duty to acquit him.

See United States v. Swiderski, _____ F.2d _____, slip opinion at 4147 (2d. Cir. June 11, 1976); United States v. Rosner 485 F.2d 1213, 1222 n.11, 12 (2d. Cir. 1973.)

1 pgcg

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UNITED STATES OF AMERICA

v.

75 Cr. 457

LEANDRO KATZ,

const'l?
no entrap dly
did give lesser
includ dly

December 9, 1976
9:50 A. M.

MR. GARNETT: The government is ready, your Honor.

MR. FISHER: The defendant is ready, your Honor.

THE COURT: Gentlemen, I am sorry I kept you waiting. I think after I get through -- there are two things I want to deal with -- I will be ready with respect to my charge. It is supposed to be on its way momentarily, but let us take up the question of entrapment first.

I am not going to give that charge. Here are my reasons.]

The test as to when a charge on entrapment must be given is whether some evidence has been adduced that the government or its agents have induced the defendant to permit the offense charged. This element of inducement, on which the defendant has the burden (*Sorrels v. United States* 287 U.S. 435, focuses on the government's initiation of the crime. Inducement has been interpreted to include "soliciting, proposing, initiating, broaching or suggesting

2pgcg

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1 the commission of the offense charged." United States versus
2 Riley, 363 F2nd 955; United States versus Sherman, 200 F2nd
3 880. It has been further held that the defendant's burden
4 in showing inducement by a government agent or informer is
5 "relatively slight." United States versus Henry 417 F2nd
6 267.
7

8 There seems to me to be two possible circumstances
9 on which the defense relies in claiming that the government
10 initiated and induced Mr. Katz' involvement in the offense.

11 First, the defense claims that Stephen and Alma
12 Wilkinson not only initially solicited Mr. Katz' involvement,
13 but severely pressured him into taking part in the trans-
14 action.

15 There is no evidence that either of the
16 Wilkinsons were paid agents or informers for the government.
17 Nor is there any evidence that either Wilkinson knew that
18 Agent Fekete was in fact working for the DEA. The defense
19 claims that the government is responsible for the actions
20 of the Wilkinsons because they were its unwitting agents.

21 We have found no cases, and the defendant has
22 cited none, that hold that an agency relationship is formed
23 whenever the government through undercover investigators,
24 enters into negotiations with someone with the purpose of
25 engaging in activity which is illegal, where the person

1
2 so contacted by the government does not know that he or she
3 is dealing with government employees but believes the
4 employee's undercover identity and story. Rather, United
5 States versus Converzano, 412 F.2d 1143, cited by the
6 government, holds the contrary.

7 I do not think that the testimony from Agent
8 Fekete concerning the inter-relationship, or lack of it,
9 between the government's deal to buy 11 kilos of cocaine
10 from Stephen Wilkinson and its deal to buy smaller quantities
11 through contacts made by Stephen Wilkinson demonstrates
12 that government employees instigated an manipulated
13 Wilkinson into arranging the smaller buys. Agent Fekete's
14 testimony indicated that Wilkinson, in the initial dis-
15 cussions he had with DEA agents held himself out as ready
16 and capable of handling both large and small cocaine
17 transactions (see transcript pages 20 and 55).

18 While the evidence suggests that Wilkinson was
19 able to buy his plane ticket to Peru with the money he made
20 from the deal involving Mr. Katz, I do not think that the
21 testimony supports the defense contention that the government
22 actually instigated Stephen Wilkinson's arrangement of
23 smaller drug transactions so as to enable Wilkinson to get
24 enough money for the ticket which would further the plans
25 for the 11 kilo sale.

A-14

1 pgcg

2 Thus, I think that the facts here are distinguish-
3 able from those in United States versus Rosner, 485 F2nd
4 1213, where the judge apparently accepted the theory that
5 the government agent induced the defendant to commit the
6 crime not only through his direct dealings with the defendant
7 but also through his deliberate utilization of others to
8 apply pressure on the defendant.

9 So I do not think, on this theory, that the
10 defendant has adduced sufficient evidence that a government
11 employee or agent induced his action to make the entrapment
12 charge appropriate.

13 The other evidence on which the defendant relies
14 is found at pages 165, 166, 208, and 209 in the transcript
15 when Mr. Katz testified that after the agent and Stephen
16 Wilkinson came to his apartment to consummate the cocaine
17 sales, the agent, in response to expressions of reluctance
18 made by Mr. Katz, urged that the deal go through.

19 We note that Mr. Fekete denies that he made the
20 statements alleged by Mr. Katz. But even assuming that
21 Mr. Katz' testimony is correct, I do not think that this
22 conduct on the part of the agent in the middle of the trans-
23 action, after Mr. Katz had already come into possession
24 of the amount of cocaine for which he knew Wilkinson had
25 a buyer, is sufficient evidence of government instigation

pgcg

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or inducement.

I find this particularly in light of the fact that later in the same day, in response to a telephone call from Stephen Wilkinson, not Agent Fekete, Mr. Katz repeated the transaction with the two men without, it appears, the verbal interchanges which accompanied the first exchange. See transcript pages 174, 175.

Thus, I do not think that the defendant has made a sufficient showing that Mr. Katz was induced by a government agent to entitle him to a charge on the defense of entrapment.

Of course, on the issue of willfulness, intent, the defendant can argue to the jury substantially the same points as he would if the entrapment defense was included in the case.

The test for when a charge of a lesser-included offense is proper has been stated by the Supreme Court as follows:

A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Sansone versus United States*, 380 U.S. 343.

On the evidence that has been presented, I think

1 pgcg

2 that the defendant has raised sufficient question as to his
3 intent and whether he "knowingly and willfully" distributed
4 or possessed the cocaine with the intent to distribute, as
5 to mean that there is here "a disputed factual element which
6 is not required for conviction of the lesser-included offense"
7 of possession.

8 MR. FISHER: Your Honor, in view of the Court's
9 ruling with regard to our request for an entrapment charge
10 and its denial of that request, I would, alternatively,
11 ask the Court to instruct the jury in substance as Devitt
12 suggests in regard to the defense of coercion.

13 THE COURT: Do you have the charge you have in
14 mind with you?

15 MR. FISHER: I could go upstairs --

16 THE COURT: We can get it. I know we have Devitt
17 in our chambers.

18 What about that?

19 MR. GARNETT: I would object, your Honor. There
20 is no evidence whatsoever that this defendant was coerced
21 into doing this transaction. There was not present any
22 circumstances to coerce him that had such a substantial
23 impact on his free will to do what he did as to disallow him
24 any other opportunity to withdraw from this transaction.

25 THE COURT: I think so. I do not think I will

COPY RECEIVED
ROBERT B. FISKE JR.
APR 19 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.